

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Abukar Hassan Ahmed,

Plaintiff,

v.

Abdi Aden Magan,

Defendant.

Case No. 2:10-cv-342

Judge Smith

Magistrate Judge Abel

**STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA**

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this Statement of Interest to convey to the Court the Department of State’s determination that Defendant Abdi Aden Magan is not immune from this suit. The various principles that underlie the foreign official immunity doctrine and the determination in this case are set forth below.¹

Procedural Background

1. According to Plaintiff’s complaint, Defendant Magan, a U.S. resident, “held the rank of Colonel and served as Chief of the [National Security Service] Department of Investigations – National Level (“NSS Investigations”) at NSS Headquarters in the capital city of Mogadishu, Somalia.” *See* Compl., ¶ 8; *see also* Def.’s Mot. to Dismiss, at 2-3, Doc. #18

¹ The United States expresses no view on the merits of Plaintiff’s claims and takes no position on the other issues raised in Defendant’s motion to dismiss.

(June 11, 2010). Plaintiff, “a native of Somalia and a naturalized citizen and resident of the United Kingdom,” alleges that Defendant, while in office, “directed and participated in the interrogation and torture of Plaintiff and other civilians perceived as opponents of the Barre regime.” *Id.* ¶¶ 9-10. The complaint further asserts that Magan “stood at the pinnacle of NSS Investigations, which systematically targeted ordinary citizens perceived as opponents of the Barre regime and subjected them to prolonged arbitrary detention, brutal interrogation, and torture.” *Id.* ¶ 17. The complaint also alleges that Magan directly ordered Plaintiff’s torture. *Id.* ¶¶ 36-37. Plaintiff brought this suit under the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note), and the Alien Tort Statute, 28 U.S.C. § 1350.

2. Defendant filed a motion to dismiss in which he argues, among other things, that Magan is entitled to foreign official immunity. *See* Def.’s Mot. to Dismiss, at 4-9, Doc. #18 (June 11, 2010). The motion has now been fully briefed and awaits this Court’s adjudication. *See* Pl.’s Opp’n, at 3-11, Doc. #25 (July 6, 2010).

Foreign Official Immunity Doctrine

3. The Executive Branch’s authority to determine the immunity of foreign officials from suit in United States courts is rooted in the general doctrine of foreign sovereign immunity, first enunciated in American jurisprudence in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). There, the Supreme Court held that, under the law and practice of nations, a foreign sovereign is generally immune from suits in the territory of another sovereign. *Id.* at 145-46; *see Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004). To determine whether a foreign sovereign is immune from suit in any particular case, “Chief Justice Marshall introduced

the practice since followed in the federal courts” of deferring to Executive Branch suggestions of immunity. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945); see *Schooner Exchange*, 11 U.S. at 134. Thus, until the enactment of the Foreign Sovereign Immunities Act (“FSIA”) in 1976, 28 U.S.C. §§ 1330, 1602-1611, courts routinely “surrendered” jurisdiction over suits against foreign sovereigns “on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General.” *Hoffman*, 324 U.S. at 34; see *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010); *Ex parte Peru*, 318 U.S. 578, 587-89 (1943). The Supreme Court made clear that “[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” *Hoffman*, 324 U.S. at 35.

4. This deferential judicial posture was not merely discretionary, but was rooted in the separation of powers. Under the Constitution, the Executive is “the guiding organ in the conduct of our foreign affairs.” *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). Given the Executive’s leading foreign-policy role, it was “an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination” on questions of foreign sovereign immunity. *Hoffman*, 324 U.S. at 36; see also *Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974) (“[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.”).

5. The immunity of a foreign state was, early on, generally understood to extend not only to the state, heads of state, and diplomatic officials, but also to other officials acting in an

official capacity. For example, in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Supreme Court rejected a suit against a Venezuelan general for actions taken in his official capacity, holding that the defendant was protected by “[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders.” *Id.* at 252.

6. The Supreme Court addressed whether the FSIA codifies the law of foreign official immunity, or instead whether it leaves the law of individual official immunity in the hands of the Executive Branch, as it was before the FSIA was passed. *Samantar*, 130 S. Ct. at 2291. The United States filed an amicus brief in that case taking the position that the FSIA should not govern the immunity of individual foreign officials. The United States argued that the text, history, and purpose of the FSIA make clear that the Act relates principally to state, not individual, immunity. U.S. Br. at 13-24, *available at* 2010 WL 342031. And the government further argued that the conclusion that the FSIA does not govern the immunity of individual officials is reinforced by the “number of complexities that could attend the immunity determination,” and the number of considerations that the Executive “might find it appropriate to take into account,” *id.* at 24-25— “complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA.” *Id.* at 24.²

² The relevant paragraph stated in full:

The conclusion that the FSIA does not govern foreign official immunity is reinforced by the number of complexities that could attend the immunity determination in this and other cases—complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA. Even in an ordinary case, in considering whether to recognize immunity of a foreign official under the generally applicable principles of immunity discussed above, the Executive might find it appropriate to take into account issues of reciprocity, customary international law and state practice, the immunity of the

7. The Supreme Court ultimately agreed with the government’s proffered reading of the FSIA. The Court explained that, “[a]lthough Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute’s origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.” *Samantar*, 130 S. Ct. at 2291. In so concluding, the Court found “no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.” *Id.* Thus, the Executive Branch continues to play the primary role in determining the immunity of foreign officials as an aspect of the President’s responsibility for the conduct of foreign relations and recognition of foreign governments. Accordingly, courts today must continue to defer to Executive determinations of

state itself, and, when appropriate, domestic precedents. But in this case, the Executive may also find the nature of the acts alleged—and whether they should properly be regarded as actions in an official capacity—to be relevant to the immunity determination.

Respondents have not only relied on the ATS to assert a federal common law cause of action, but have also invoked the statutory right of action in the TVPA for damages based on torture and extrajudicial killing. And respondents, some of whom are United States citizens, have brought that action against a former Somali official who now lives in the United States, not Somalia.

U.S. Br. at 24-25. The government also noted the potential relevance of “the foreign state’s position on whether the alleged conduct was in an official capacity” and whether “a foreign state [has sought] to waive the immunity of a current or former official, because immunity is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state.” *Id.* at 25-26. The identification of certain considerations that the Executive could or might find it appropriate to take into account served to underscore the range of discretion properly residing in the Executive under the Constitution to make immunity determinations in particular cases. It did not reflect a judgment by the Executive that the considerations mentioned were exhaustive or would necessarily be relevant to any particular immunity determination if, as the United States argued to the Supreme Court, the responsibility for doing so was vested in the Executive and not governed by the FSIA. The present filing reflects the basis for the Executive’s immunity determination in this case.

foreign official immunity, just as they deferred to determinations of foreign state immunity before the enactment of the FSIA.

8. In *Samantar*, the Supreme Court explained that if the Department of State recognized and accepted the foreign government's request for a suggestion of immunity, "the district court surrendered its jurisdiction." 130 S. Ct. at 2284. The Executive's role traditionally has encompassed acknowledging that certain foreign government officials enjoy immunity because of their particular status as well as acknowledging whether the officials should be immune from suit for the conduct at issue. See, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (deferring to State Department's determination that alleged conduct was "of a public, as opposed to a private/commercial nature"). Taking into account the relevant principles of customary international law, the Department of State has made the attached determination on immunity in this case, and we explain below certain critical factors underlying the Executive's determination here. See State Dep't Letter, attached as Ex. 1. Because the Executive Branch is taking an express position in this case, the Court should accept and defer to the determination that Defendant is not immune from suit.³ See *Samantar*, 130 S. Ct. at 2284; *Isbrandtsen Tankers*, 446 F.2d at 1201 ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

³ After the Supreme Court's remand in *Samantar*, the United States District Court for the Eastern District of Virginia applied these principles and deferred to the Executive Branch's determination: "The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common law sovereign immunity defense is no longer before the Court, which will now proceed to consider the remaining issues in defendant's Motion to Dismiss." *Yousuf, et al. v. Samantar*, Civ. No. 04-1360, Doc. #148 (E.D. Va. Feb. 15, 2011).

Grounds for Determination in this Case

9. Upon consideration of the facts and circumstances in this case, as well as the applicable principles of customary international law, the Department of State has determined that Defendant enjoys no claim of official immunity from this civil suit. *See* Ex. 1. Particularly significant among the circumstances of this case and critical to the present Statement of Interest are (1) that Magan is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity, and (2) the Executive's assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Magan who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts.

10. The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official. *See, e.g., Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits) (a foreign official “will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity”). Former officials generally enjoy residual immunity for acts taken in an official capacity while in office. *Id.* Because the immunity is ultimately the state's, a foreign state may waive the immunity of a current or former official, even for acts taken in an official capacity. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (“Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders.”).

11. The typical practice is for a foreign state to request a suggestion of immunity from the Department of State on behalf of its officials. *See Samantar*, 130 S. Ct. at 2284 (citing *Hoffman*, 324 U.S. at 34-36); *Ex parte Peru*, 318 U.S. 578; *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938). Because the immunity belongs to the state, and not the individual, and because only actions by former officials taken in an official capacity are entitled to immunity under customary international law, the Executive Branch takes into account whether the foreign state understood its official to have acted in an official capacity in determining a former official's immunity or non-immunity.

12. This case presents a highly unusual situation because the Executive Branch does not currently recognize any government of Somalia. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."). As noted, a former official's residual immunity is not a personal right. It is for the benefit of the official's state. In the absence of a recognized government authorized either to assert or waive Defendant's immunity or to opine on whether Defendant's alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here. That determination has taken into account the potential impact of such a decision on the foreign relations interests of the United States. *See Ex. 1*. In future cases presenting different circumstances, the Department could determine either that a former official of a state without a recognized government is immune from civil suit for acts taken in an official capacity, or that a former official of a state with a recognized government is not immune from civil suit for acts that were not taken in an official capacity.

13. The Executive's conclusion that Defendant is not immune is further supported by Defendant's statement that he has been a resident of the United States since May 2000. *See* Def.'s Mot. to Dismiss, Doc. #18, at 3 (June 11, 2010). A foreign official's immunity is for the protection of the foreign state. Thus, a former foreign official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit for acts taken while in office. Basic principles of sovereignty, nonetheless, provide that a state generally has a right to exercise jurisdiction over its residents. *See, e.g., Schooner Exchange*, 11 U.S. at 136. In the absence of a recognized government that could properly ask the Executive Branch to suggest the immunity of its former official, the Executive has determined in this case that the interest in permitting U.S. courts to adjudicate claims against U.S. residents warrants a denial of immunity.

Conclusion

For the foregoing reasons, the United States has determined that Defendant Magan is not entitled to official immunity in the circumstances of this case.

Dated: March 15, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2011, the foregoing Statement of Interest was filed using the Court's CM/ECF system, which will notify all counsel of record in this matter.

/s/ Eric J. Beane
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